Supreme Court, U.S.
FILED

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Case Number _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

K. R. B.,

Petitioner,

vs

JAY C. STEPHENSON, COBB COUNTY, PHILLIP SEGRIST, HARVEY PASCHAL, BILL COOPER, EMMETT BURTON, STAN WISE, individually and in their official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

The Court should grant the Petition to resolve the issues of:

1. Whether a state court can order a criminal record sealed and then give the person who had a vested constitutional liberty and property interest in the sealed record no recourse when the record is left available to the public and subsequently broadcast on a major television station fifteen years later.

2. Whether the lower courts erred in finding that the "guarantee of personal privacy" is not in this situation fundamental or implicit within the concept of ordered liberty and therefore as a result declined to apply a balancing test balancing the state interest in the Open Records Act against plaintiff's interest in having the record remain sealed.

3. Whether the act of "effectively sealing" a criminal record pursuant to a court order is a discretionary act or ministerial act.

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5. The Georgia Court of Appeals Order

6. The Georgia Supreme Court Order.

See A-1, B-1, C-1, D-1, E-1, F-1.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked pursuant to U.S.C.A. 28 § 1257(a).

STATEMENT OF THE CASE

The plaintiff has brought this action asserting that the Clerk of Court, in failing to have a procedure to seal court records, and in failing to seal court records has violated plaintiff's right to privacy. The Clerk of Court's reckless indifference to the performance of a ministerial duty has caused damages to the plaintiff for which he is entitled to recover.

In this instance, the Courts of the State of Georgia have chosen not to recognize the right to privacy which Cobb County Superior Court gave to the petitioner in 1975. In 1974, the plaintiff entered into a plea agreement with the district attorney and pled to criminal charges pending against him. These charges involved gambling and possession of marijuana. The next year, the attorney for the plaintiff filed a petition to seal the records, which was granted in a prepared order dated Sept. 17, 1975. Appendix A-1.

The plaintiff relied on the court order for fifteen years and built a career as a successful

coach. Every day for fifteen years, the plaintiff had worked diligently to influence his students and ball players to become successful leaders, students and athletes. He had been successful at earning the respect of the community and had led his football team to a championship season.

In 1989, the criminal records of the plaintiff were broadcast over Channel 5, the Atlanta affiliate of CBS. The court personnel helped the television reporter find the records and knew that they had been sealed by the court.

REASONS FOR GRANTING THE WRIT

The judgment of the lower courts should be reviewed by this court. As a preliminary matter, never before has the public had greater access to information while at the same time the public has a greater lack of privacy. Never before has the media had a greater affinity for material which appears scandalous. And, never before has the integrity of the judicial system been under greater scrutiny. All of these concerns are addressed by this suit.

I. Whether the plaintiff has no state remedy and is therefore entitled to his due process rights and right to privacy guaranteed by the federal constitution.

The state holds that the plaintiff suffered no violation of his constitutional rights. Through the final adjudication of a criminal proceeding, plaintiff was guaranteed that his criminal records would be sealed.

In 1974, the Cobb County Superior Court held "IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Clerk of Cobb Superior Court effectively seal the record and the indictment referred to in said petition so that the same will not be made available to the public; however, the Clerk is required to furnish the indictment and sentence to any court when ordered to do so. The records in the Identification Bureau are hereby ordered effectively sealed so as to prevent the public from having access thereto unless otherwise ordered by this court or some other court with competent jurisdiction.

SO ORDERED, this 17th day of September, 1975.

JAMES L. BULLARD,

JUDGE, COBB SUPERIOR COURT, CJC

Recorded 9/18/75 (Sealed file No. 6644)

Upon petition to the court, with evidence being submitted, the Courts of Georgia promised the plaintiff that his records would be sealed from the public. Fifteen years later, he and the rest of the world saw a portion of these records on the six o'clock news.

Georgia was one of the first states in the nation to recognize an action for the invasion of privacy. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190 (1905).

When the State granted the plaintiff the right to have his records sealed, this right became vested. Plaintiff thereafter relied on this right and decided to return to his coaching career.

The letter and spirit of the plea agreement, the subsequent order to seal the records, and the

laws relating to first offenders create a federal and state constitutional right to privacy given to those who are granted an order sealing court records.

Distinguishing *Griswold vs State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (U.S.Conn., 1965) from the situation in *Bowers v Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 at 2844, 92 L.Ed.2d 140 (1986), the U.S. Supreme Court said the privacy rights from which the *Griswold* line of cases are found to emulate concern the protection provided by the due process clause.

The courts have historically analyzed constitutional tort law beginning with the question of whether a defendant owed a duty to the plaintiff. However, constitutional claims are usually asserted against a governmental entity, and the duty question would more easily be saved for later. As the State of Georgia did, in reasoning that an act does not reach "constitutional dimensions", by using traditional

analysis, the courts have skirted all issues of importance to the analysis of the legal question. This kind of analysis has left the country with opinions pointing in scattered directions, leaving no coherent case law for such claims.

Such cases would be better served by using a two step analysis. First, the threshold question should be "did the act complained of deprive the individual of a guaranteed right (either a specifically enumerated right or right created by penumbra)?", the response being able to guide the court to the next question. And second, if the governmental entity actually committed the complained of act, did the official know, or is it reasonable to assume the official knew, that to do or not do the act (as the case may be) would result in substantial harm to an individual. If these questions are answered in the affirmative then the case should not be summarily disposed.

Rights which qualify for heightened judicial protection include those fundamental liberties

that are "implicit in the concept of ordered liberty," such that neither liberty nor justice would exist if [they] were sacrificed. *Id.* at 2844. It stands to reason that the legal analysis should therefore begin with a look toward the actual claim, instead of the beginning with the traditional duty. Because the more complicated analysis, involving the exceptions to the duty, have been looked at first by the courts, we are left with a complicated pattern to try to interpret. It is simply more efficient to first classify a right as constitutional or not, and then define whether there is a duty that has been breached.

Using this procedure in the instant case, the plaintiff alleges that his entire life has been altered by the actions of defendants, including his right to earn a living and his health. Clearly the act has implicated his liberty interests. The next question then would also be answered in the affirmative. The defendants knew they had a duty to seal the

records, the duty to seal the records was clear. The act was not discretionary and it was obvious to the reasonable person that to not seal the records, there was a great likelihood that substantial harm would come to the plaintiff.

At all times, Defendants were acting under color of state law and knew or should have known that the failure to effectively seal the plaintiff's court records would cause irreparable harm to the plaintiff.

Briscoe v. Reader's Digest Association, 4 Cal. 3d 529, 93 Cal. Rpt. 866, 483 P2d 34, 1 Media LR 1845, 57 ALR3d 1 (1971) supports this argument. Reader's Digest published a story on truck hijacking. Included in the article were the name and facts of a truck hijacking wherein the plaintiff in *Briscoe* had been charged and convicted.[1] The conviction was rendered eleven years before the story was published. The court

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[1] Unlike the plaintiff in the instant case, who was never legally convicted.

concluded that issues for the trier of fact to determine were the following:

1. Whether plaintiff had become a rehabilitated member of society.

2. Whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man.

3. Whether defendant published this information with a reckless disregard for its offensiveness, and

4. Whether any independent justification existed for printing plaintiff's identity.

The plaintiff has a federally recognized liberty interest in his reputation as he has been "stigmatized-plus" as defined in *Marrero v. City of Hialeah* 625 F.2d 499 at 512 (1980). *Goss v. Lopez* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) involved injury to reputation plus denial of right to attend school. *Board of Regents v. Roth* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) involved injury to reputation plus refusal to rehire. *United States v. Lovett* 328 U.S. 303,

66 S.Ct. 1073, 90 L.Ed.2d 1252 (1946) involved injury to reputation plus prohibition of future government employment. The Court held that the "plus" of the "stigma-plus" requirement need not itself be a protected liberty or property interest. *Marrero* at FN17 citing *Roth* 408 U.S. at 573, 92 S.Ct. at 2707 and *Paul v. Davis* 424 U.S. 693 at 709, 96 S.Ct. 1155 at 1164, 47 L.Ed.2d 405 at (1976).

II. The proper test should have been a balancing of state interests vs. the individual right.

The court failed to find that any state interest was being protected. The Court merely chose to say that the Petitioner's claim "did not reach constitutional proportions." Appendix C-13. When fifteen year old criminal records are revealed to the world, how can this not infringe on one's right to earn a living? The deprivation surely reaches a constitutional dimension when one is fired from their job and cannot obtain other employment in their chosen profession upon the release of court records which have been

sealed by court order. The Georgia Courts, having held that this does not reach constitutional dimensions means that the petitioner has no recourse under state law. Therefore his action brought under 42 U.S.C.§ 1983 must be analyzed. *Grant v. Newsome* 411 S.E.2d 796 (Ga. App. 1991).

In any 42 U.S.C. § 1983 suit the plaintiff must prove a violation of the underlying constitutional right. *Daniels v Williams* 474 U.S. 326 (106 S.C. 662, 68 LE2d 420)(1981). In *Daniels,* the Supreme Court distinguishes the actions of government officials between an "abuse of power" and a "lack of due care" and state that in negligence actions state remedies are adequate to provide the claimant with redress from the alleged injury.

Defendant Jay Stephenson neither implemented a policy to effectively seal the plaintiff's court records nor trained his employees how to effectively seal these records.

Local governing bodies (and local officials sued in their official capacities) can be sued

directly for relief in those situations where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. *Monell v. Department of Social Services of New York* 98 S.Ct. 2018, 436 U.S. 658, 56 LE2d 611 (1978).Id. at 2019. Additionally, local governments may be sued for "custom", even though the custom has not received the official approval.

For the local government to be held liable, a causal link must be established between the execution of official policy and the constitutional deprivation *Id.* This causal link may be established by a showing of the supervisory official's direct responsibility for the actions of the officers who engaged in the misconduct. *McQurter v. City of Atlanta* 572 F. Supp. 1401 at 1419 (1983). The official need not have participated in the constitutional

deprivation for causation to be established, but he may be held liable if he breaches a duty imposed by state or local law and this breach causes the plaintiff's constitutional injury. Failure of a supervisor to perform proper supervisory duties and training is also grounds for liability. *Id.*

There is no question that defendants were acting under color of law when they failed to establish a policy which left material portions court records of the plaintiff in the public record room. Whether the actions amounted to a federal constitutional deprivation must also be answered in the affirmative. The plaintiff was not just stigmatized; he lost his job, has not been able to obtain employment, and he has suffered emotional and health problems. See *Marrero v. City of Hialeah* 625 F.2d 499 at 512 (1980). *Goss v. Lopez* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

The power of a Judge to issue orders is the fundamental basis for the adjudication of all

disputes at the trial level in the State of Georgia. Every court in the State has the power to "compel obedience to its judgements, orders, and process," and to "control ... the conduct of its officers and all other persons connected with a judicial proceeding before it." O.C.G.A. § 15-1-3. Furthermore, to enforce their orders, judges are given the power to issue contempt orders for disobedience of earlier orders. O.C.G.A. §15-1-4. Thus, when a court order is issued, all parties subject to it must obey that order; a Clerk of Court is not exempt from the responsibility to obey a court order. Fully aware of the plaintiff's coaching abilities, and to protect the reputation of the plaintiff, Judge Bullard ordered plaintiff's records sealed so they would not be available to the public. Appendix A-1.

The plaintiff built his career on two things, his own ability and perseverance and the promise of Judge Bullard and the Georgia First Offender statute. The purpose of the bargain was for society's benefit as well as his own. He was

given a second chance to become a productive member of society.

The reasons Georgia enacted the First Offender Statute are understandable. Georgia has a strong governmental interest in providing individuals with an opportunity to be productive, successful citizens. Knowing that the main impact of criminal justice records on individuals is to foreclose employment and other benefits that are normally available to persons in society, to grant an individual treatment under the First Offender Act gives not only the individual a fresh start, it assists in creating a person who will be productive to society. *See* *The Politics of Privacy, Computers, and Criminal Justice Records*, Donald Marchand at 109.

Finally, as a matter of law, Defendants may not validly claim sovereign immunity as a defense to a claim based on 42 U.S.C. § 1983. As *Monell* states, under a § 1983 claim, the government as an entity is responsible for the injury when the injury is due to the "execution of a government's

policy or custom, whether made by its lawmakers or by those whose ... acts may fairly be said to represent official policy." 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-2038 (1978). *See also Poss v. City of North Augusta, South Carolina*, 205 Ga. App. 894, 424 S.E. 2d 73 (1992); *Franklin v. Gwinnett County Public Schools*, 200 Ga. App. 20, 407 S.E. 2d 78 (1991). Defendants' handling of first offender records, minute books and docket books was clearly Cobb County government policy or custom. Other counties in the State of Georgia had some type of policy or custom in ensuring the confidentiality of first offender records.

Even if a negligent act by a public official or employee is discretionary as opposed to ministerial, immunity is still waived to the extent that the public entity is protected through an insurance system for liability for the acts of its officers and employees. *See Logue v Wright*, 260 Ga. 206 (1990). This must include the $25,000 bond required of Superior Court Clerks at O.C.G.A. § 15-6-59.

III. In Response to a Court Order directing a governmental official to effectively seal a criminal record, the act of sealing the record is a ministerial act.

An order directing a public official to "effectively seal" a court record is a ministerial duty. *See: Griffin-Spalding County Hosp. Auth. v Radio Station WKEU,* 240 Ga. 444 (1978). Although Georgia has an Open Records Act, there may be some material contained therein which for competing public policy reasons are not subject to disclosure. See O.C.G.A. § 50-18-70 *et seq; Harris v Cox Enterprises, Inc.*, 256 Ga 299 348 S.E.2d 448 (1986). "We think Code Ann. 40-2702[2] requires a custodian of public records to preserve the confidentiality of information that the public does not have a right to see." *Griffin* at 447. The courts of Georgia have held

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[2]Georgia Open Records Act, currently O.C.G.A. § 50-18-72. [footnote added].

that to establish a claim for public disclosure of a private fact it must be shown that the fact disclosed was private, secluded or secret. Appendix C-6. In this situation, this should have been a question of fact for a jury to decide. Fifteen years after the sealing of these records, the event was all but forgotten.

Additionally, all of the facts relied on by the trial judge in the instant case in granting summary judgment to the defendants were facts known to the judge at the time evidence was heard and the record was ordered sealed in 1975.[3]

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[3] In the instant case, the court holds:

> First, arrest and plea were in open court. Second, no confidentiality provisions of First Offender records were in force at time of plea. Third, the case file and indictment were sealed. [which is a question of fact]. And, since plaintiff had not completed his probation at the time the court ordered the records sealed, he was still subject to a felony

Sovereign immunity does not protect State officials and employees who perform ministerial duties negligently. *International Business Machines Corp. v Georgia Dept. of Administrative Services,* ___ Ga.___ (___ S.E.2d ___) Case No. S95A0072, decided 2-20-95 (Benham, P.J., concurring in part, dissenting in part) *citing Hennessey v Webb,* 245 Ga. 329, 330, 331, 264 S.E.2d 898 (1980).

Clerks are presumed to have done the acts that they have been mandated to perform. *See Trice v. Howard,* 130 Ga. App. 895, 204 S.E. 2d 808 (1974). The Clerk of Court is obligated to perform ministerial duties. O.C.G.A. § 15-6-61.

The distinction between the two types of duties is that in the performance of a ministerial job, there are no choices to be made by the official who performs the job, while in

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conviction [which never happened, except in the media]. Appendix C-7.

the performance of a discretionary job, there area choices available. In *Logue v Wright*, 260 Ga 206,392 S.E.2d 235 (1990) the police officer's use of his siren and flashing lights while responding to an emergency call was considered a ministerial duty, while his decision to rush to the scene was discretionary. Id. 260 Ga. 206, 207-208 (1990). In that case, Police officers were required by law to use their lights and sirens when acting beyond the traffic laws. Those duties which must be performed to obey an order or rule are ministerial. *See Nelson v. Spalding County*, 249 Ga. 334, 290 S.E. 2d 915 (1982).

CONCLUSION

By keeping the court records of Plaintiff's 1974 case open to the public and by assisting members of the media in examining those records, Defendants violated the rights of the plaintiff. By failing to seal all of the records and all documents pertaining thereto, Defendants further violated a Court Order. This caused extensive

injuries to the Plaintiff, who had continued his career as a coach and teacher in reliance on the power of the sealing of his records.

As a result of the reckless indifference of the Defendants in disobeying judicial law, they have violated plaintiff's liberty and property interests.

Respectfully Submitted.

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IN THE SUPERIOR COURT OF SAID COUNTY

IN RE: PETITION OF KEN BREWER

ORDER

The above and foregoing petition having been presented, read, and considered, let the same be filed.

The Honorable Georgia W. Darden having consented to the entry of an order sealing the records and the petition otherwise being supported by affidavits; IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Clerk of Cobb Superior Court effectively seal the record and indictment referred to in said petition so that the same will not be available to the public; however, the Clerk is required to furnish the indictment and sentence to any court when ordered to do so. The records in the Identification Bureau are hereby ordered effectively sealed so as to prevent the public from having access thereto unless otherwise ordered by this court or some other court with competent jurisdiction.

ORDERED, this 17th day of September, 1975.

s/ James L. Bullard

James L. Bullard, Judge

Cobb Superior Court

Cobb Judicial Circuit

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Clerk's Office, Superior Court

Cobb County, Georgia

filed in office

This Sept. 18, 1974

s/Tyre Lee Terry, Clerk

B-1

IN THE SUPERIOR COURT FOR COBB COUNTY

STATE OF GEORGIA

THE STATE — Docket no. 6644

vs. — County of Cobb

KENNETH RAY BREWER — In the Superior Court

Defendant

ORDER OF DISCHARGE

WHEREAS, the above named defendant, having been placed on probation on the 1 day of November, 1974 for a period of 1 year in accordance with the provisions of the Probation for First Offenders Act (Ga. Laws 1968, p. 324) without an adjudication of guilt, and...

WHEREAS, this Court having been petitioned by the defendant's Probation/Parole Supervisor to discharge said defendant because of his having fulfilled the terms of probation;

WHEREAS, IT IS ORDERED AND DIRECTED THAT in accordance with the provision of the Probation for First Offenders Act (Ga. Laws 1968, p. 324):

A. The defendant be discharged without court adjudication of guilt;

B. That this discharge shall completely exonerate the defendant of any criminal purpose;

C. That this discharge shall not affect any of said defendant's civil rights or liberties; and

D. The defendant shall not be considered to have a criminal conviction.

IT IS FURTHER ORDERED AND DIRECTED that a copy of this Order of Discharge be forwarded to the Office of the State Probation System and a copy forwarded to the Identification Division of the federal Bureau of Investigation.

Ordered this 8th day of December, 1975.

James L. Bullard

Judge

Cobb Superior Court C.J.C.

Court

Recorded 12-9-75

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

K.R.B., Plaintiff,	*	
vs.	*	CASE NO. 92 11152-07
JAY C. STEPHENSON, individually, and in his capacity as Clerk of Court, COBB COUNTY a corporate body, PHILIP SEGRIST, individually and in his official capacity as County Commissioner, HARVEY PASCHAL, individually and in his official capacity as County Commissioner, BILL COOPER, individually and in his official capacity as County Commissioner, EMMETT BURTON, individually and in his official capacity as County Commissioner, STAN WISE, individually and in his official capacity as County Commissioner, Defendants.	*	

ORDER

Defendants' Motion for Summary Judgement came regularly before the Court for consideration. Upon review of the entire record, and after hearing oral argument, the Court issues the following ruling:

Factually, Plaintiff was arrested in 1974, and subsequently indicted, on charges of gambling

and violation of the Georgia controlled substances act. Plaintiff entered a plea of nolo contendere to the charges in the Superior Court of Cobb County, and was sentenced under the provisions of the First Offender Act on December 9, 1974. At the time of Plaintiff's arrest and plea in open court, the confidentiality provisions of the First Offender Act were not in effect.

Prior to the successful completion of the Plaintiff's probationary period, Judge James L. Bullard, issued an order requiring the Clerk of the Cobb Superior Court to:

[E]ffectively seal the record and the indictment referred to in said petition so that the same will not be available to the public; however, the Clerk is required to furnish the indictment and sentence to any court when ordered to do so. The records in the Identification Bureau are hereby ordered effectively sealed so as to prevent the public from having access thereto unless otherwise ordered by this court or

some other court with competent jurisdiction. (Order of September 17, 1975).

On December 9, 1975, Plaintiff successfully completed his probationary period. The General Assembly of the State of Georgia approved an amendment, to the First Offender Act on April 3, 1978. Pursuant to the amendment, the record of discharge, was to be released solely to legal personnel, such as the Attorney General, district attorneys, solicitors, probation officers, prosecuting attorneys and the Board of Pardons and Parol. Under this amendment, access to the record was strictly limited, but not prevented entirely.

This amendment was effective in 1989. In the fall of that year, Plaintiff, a football coach, was implicated in a "grade changing" incident. In light of this controversy, a television reporter and cameraman came to the office of the Clerk of the Cobb Superior Court to investigate Plaintiff. Plaintiff asserts that Defendants helped these media persons locate the

minutes of the Plaintiff's sealed record and the docket reflecting said record. (Plaintiff's Complaint ¶ 12).

Plaintiff assert that "by reason of such disclosure, the Plaintiff has been held up to the public contempt and ridicule, has suffered a heart attack and has had his standing in the coaching profession irreparably damaged, making him unable to obtain employment in his chosen profession." (Plaintiff's Complaint ¶ 21).

As a result of the disclosure, plaintiff is seeking damages from the Clerk of the Cobb Superior Court, Jay C. Stephenson, and also from the Cobb County and the individual Commissioners, asserting both state and federal claims. Defendants in response are seeking summary judgement.

Cause of Action under the First Offender Act

Review of the First Offender Act, as it existed at the time of the plea and sentencing, and as it currently exists, clearly indicates that while the Georgia Clerks of Court are

directed as to how they should treat First Offender records, the Act does not provide for specific remedy provisions in the event the Act has been violated. In short, there is no private cause of action based solely on the alleged violation of the Act. Accordingly, Plaintiff must assert that a result of the alleged violation, Defendants have committed a separate tort.

Right to Privacy under State Law

In the case at Bar, plaintiff asserts that as a result of Defendant's acts, Plaintiff's right to privacy under state law and U.S. Constitution has been violated and he has thus been deprived of his liberty and property interests.

Georgia courts have long recognized the tort of invasion of privacy. In Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E. 2d 496 (1966), the Court of Appeals set out four categories of this tort. These categories are:

1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;

2) Public disclosure of embarrassing private facts about the plaintiff;

3) Publicity which places the plaintiff in a false light in the public eye; and

4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Applied to the case at Bar, categories 1, 3 and 4 are not applicable. Category 2, the public disclosure of a private fact, does not require a more in-depth analysis.

To establish a claim for public disclosure of a private fact, it must be shown that the fact disclosed to the public was private, secluded or secret. The issue, therefore, is whether the Defendants publicly disclosed a private or secret fact about the Plaintiff by listing Plaintiff's name in the minutes and in the docket book.

After careful review of the facts, the court determines that Defendants did not disclose a private or secret fact regarding the Plaintiff by listing his name in the minutes and docket book.

First, Plaintiff's arrest and his plea in open court were, by their nature, manifestly matters of public information. Second, the confidentiality provisions of the First Offender Act were not in effect at the time of the plea or the completion of the probation, accordingly, Plaintiff received the benefit of his First Offender bargain. Third, Judge James L. Bullard's Order of September 17, 1975, was complied with. The Clerk of Court, at that time, sealed the case file and the indictment. (Stephenson Deposition p. 43). The Order, which was entered prior to the completion of the probationary period, did not order the Plaintiff's name expunged from the record of the court. (See Stephenson Deposition p. 42). Additionally, since Plaintiff had not completed probation at the time the order was entered, he was still subject to having a felony conviction at that time.

(As a side note, the First Offender Act was amended in 1990 to again allow no limitation on

the dissemination of the offender's record. Additionally, pursuant to Judge Michael Stoddard's Order of April 3, 1991, plaintiff's record is now open to the public).

Sovereign Immunity

Cobb County and the County Commissioners enjoy immunity from any state claim pursuant to grant of sovereign immunity. "The doctrine of sovereign immunity has been recognized in this state since the adoption of the common law. It also applies to political subdivisions of the state, including counties." Hennessy v. Webb, 245 Ga. 329, 264 S.E.2nd 898 (1980). "A county is not liable to suit for any cause of action unless made so by statute." O.C.G.A. § 36-1-4. Applying the sovereign immunity law in effect at the time of the incident, the County did not waive its sovereign immunity under the Ga Const., Art. I, § 2 ¶ 9, for Cobb County, Georgia does not have any general liability insurance." (Affidavit of Cheryl Webb, Rick Manager, Cobb County, Georgia, para 6). Additionally, the Clerk

of Court, Jay C. Stephenson, enjoys official immunity.

It is well established that where an officer is invested with the discretion and is empowered to exercise his judgement in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as a result of an erroneous decision; provided the acts complained of are one within the scope of the officer's authority, and without wilfulness, malice, or corruption. These discretionary acts .... lie midway between judicial and ministerial ones. The question depends on the character of the act. If the act done for which recovery is sought is judicial or quasi-judicial in it nature, the officer acting is exempt from liability. State Board of Education v. Drury, 263 Ga. 429, 435 S.E.2nd 436 (193); Hennessy v. Webb, 245 Ga. 329, 264 S.E.2nd 878 (1980).

While the issue of whether a public officer's acts are ministerial or discretionary is determined by the facts of the particular case, in Nelson v. Spalding County, 249 Ga. 334, 290 S.E.2nd 915 (1982), the Georgia Supreme Court determined that the decisions regarding office procedures are the matter of personal judgement and therefore discretionary.

Accordingly, in the case at Bar, the organization of the Clerk's office and the decisions of the Clerk's office regarding the minutes and docket books are matters of discretion. This determination is supported by the affidavits submitted by the Plaintiff. For instance, the Clerks of Court for Douglas, Paulding and Barrow Counties, all follow slightly different procedures in addressing First Offender records.

Federal Privacy Claim

As for the federal claim, 42 U.S.C. § 1983 is the controlling federal authority on the right of a citizen to recover damages for an alleged

deprivation of his federal constitutional rights under color of state law. The issue in the case at Bar is whether Plaintiff has been denied his constitutional right to privacy by Defendants.

The law regarding the right to privacy is in a state of flux. It is clear though, that while the Constitution protects several specific aspects of individual privacy, this does not mean it protects all aspects of individual privacy.

It must be noted, that the cases cited by both parties are distinguishable from the case at Bar in that they address such issues as, whether sealing records is proper under law and whether sealed records can be opened. The cases do not address the issue on whether a cause of action exists against the government for an alleged violation.

In J. P. v. DeSanti, 653 F.2d 1080, (6th Cir. 1981), which presents facts somewhat akin to the case at Bar, the Court found that there was no cause of action for the dissemination of personal information of juvenile offenders to

fifty-five social service agencies as provided for under Ohio law.

In reaching its holding, the Court referred to Paul v. Davis, 424 U.S. 693, 713 S.Ct. 1155, 47 L.Ed.405 (1976), in which the U.S. Supreme Court stated the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit" within the concept of ordered liberty.

The DeSanti Court found "non-disclosure of juvenile court records of private information to be far afield from those privacy rights that are fundamental or implicit in the concept of ordered liberty." In reaching this holding the DeSanti Court distinguished the case from Whalen v. Roe, 429 U.S. 589, 97 S.Ct.869, 51 L.Ed2d 64 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), in which a balancing test was applied on grounds those cases did not address the issue of non-disclosure regarding personal information collected by the state. The DeSanti court held

that, "Not all rights of privacy or interests in non-disclosure of private information are of constitutional dimension, so as to require balancing of governmental action against individual privacy."

While the circuits have split on whether to apply a balancing test, and the Court acknowledges that DeSanti addresses the issue if dissemination of information rather than an alleged failure by a government official to "seal records," the Court agrees with the logic of the DeSanti case and finds listing of the Plaintiff's name in the docket book and the minutes does not reach constitutional dimension. Specifically, the Court finds a listing in the minutes and docket book does not equate to a privacy right that is fundamental or implicit in the concept of ordered liberty.

To prevail on a motion for summary judgement a defendant-movant is required to pierce the allegations of the complaint and to establish as a matter of law that the plaintiff could not

recover under any theory drawn from the pleading and the evidence; once he pierces the pleading of plaintiff and shows the court that one essential element, under any theory, is lacking and incapable of proof, the defendant-movant is entitled to summary judgement as a matter of law. Holiday Inns, Inc. v. Newton, 157 Ga. App. 436, 728 S.E.2d 85 (1981).

Applying the standard cited above to the facts of the case at the Bar, the Court finds no genuine issue of material fact exists. Defendants' Motion for Summary Judgement is hereby granted.

SO ORDERED, this the 26th day of January, 1994.

S/

P. Harris Hines, Judge
Superior Court of Cobb County

In The Court of Appeals of Georgia

A94A1579. K.R.B. v Jay Stephenson, et al.

McMurray, Presiding Judge.

AFFIRMED IN ACCORDANCE WITH COURT OF APPEALS RULE 36.

Judgment affirmed. Pope, C.J., and Smith, J., concur.

COURT OF APPEALS

of the State of Georgia

Atlanta, August 12, 1994

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

K.R.B. v Jay C. Stephenson et al

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta August 12, 1994
I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ William Martin Clerk.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: Jan. 19, 1995

Case No. S94C1937

K.R.B. v Jay C. Stephenson et al

The Supreme Court denied the petition for certiorari in this case.

All the justices concur.

Sincerely,

Sherie M. Welch, Clerk